Parker Laboratories, Inc. *and* John Kenneth Jensen.
Case 22-CA-11104

12 September 1983

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On 18 October 1982 Administrative Law Judge Robert T. Snyder issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order.[2]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the amended complaint herein be, and it hereby is, dismissed in its entirety.

[1] The General Counsel has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

Member Zimmerman would find that the Respondent had no knowledge of Jensen's discussions with other employees concerning his wage problem and would dismiss the 8(a)(1) allegation of the complaint for that reason. He notes that the Administrative Law Judge credited President Buchalter's denial that he ever learned from Plant Manager Boston about Jensen's complaining to other employees.

[2] Subsequent to the issuance of the Administrative Law Judge's Decision in this proceeding, the United States Supreme Court issued its Decision in *NLRB v. Transportation Management Corp.*, 97 LC ¶ 10,164, 113 LRRM 2857 (15 June 1983), reversing a decision by the First Circuit Court of Appeals, relying on its previous decision rejecting the Board's *Wright Line* test, *NLRB v. Wright Line*, 622 F.2d 899 (1st Cir. 1981), which had refused to enforce the Board's Order and remanded for consideration of whether the General Counsel had proved by a preponderance of the evidence that an alleged discriminatee would not have been fired had it not been for his union activities. The Supreme Court held that the Court of Appeals for the First Circuit erred in its *Wright Line* decision when it held that Sec. 10(c) forbids placing the burden on the employer to prove that absent the improper motivation he would have acted in the same manner for wholly legitimate reasons. The Supreme Court concluded that the court of appeals erred in refusing to enforce the Board's Orders, which rested on the Board's *Wright Line* decision.

We find, in agreement with the Administrative Law Judge, that the Respondent has demonstrated a valid business reason for employee Jensen's discharge, and that such reason motivated its decision to discharge Jensen even in the absence of Jensen's stated intention of filing a charge with the Board.

DECISION

STATEMENT OF THE CASE

ROBERT T. SNYDER, Administrative Law Judge: Pursuant to a charge filed on September 1, 1981, a complaint issued on October 16, 1981, alleging that Parker Laboratories, Inc., herein called Respondent, discharged John Kenneth Jensen, herein called Jensen, because said employee engaged in certain protected concerted activities including advising Respondent in writing of his intent to file charges with the National Labor Relations Board, in violation of Section 8(a)(1) of the Act. Upon the basis of an amended charge filed November 19, 1981, the General Counsel successfully moved, without objection, at the opening of the hearing to amend the complaint to allege that by the same conduct Respondent engaged in unfair labor practices within the meaning of Section 8(a)(4) of the Act. By written answer, and by position expressed orally at the outset of the hearing, Respondent denied the commission of any unfair labor practices in violation of the Act. Hearing was held before me in Newark, New Jersey, on July 2, 1982. At the conclusion of the hearing, both parties presented oral argument, and Respondent thereafter also filed a post-hearing brief. Such arguments and brief have been duly considered.

Upon the entire record in this case, including my observation of the witnesses, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent is a New Jersey corporation with its principal office and place of business located at 307 Washington Street, Orange, New Jersey, where it is engaged in the manufacture, sale, and distribution of gels and related products used with various medical testing apparatus. At all times material herein, Respondent has caused to be manufactured, sold, and distributed at said Orange facility, products valued in excess of $50,000, of which products valued in excess of $50,000 have been shipped from said Orange facility in interstate commerce directly to States of the United States other than the State of New Jersey. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

In July 1981,[1] Jensen sought employment with Respondent. A friend of his, already employed by the Company, suggested Jensen as a likely candidate for work in shipping and receiving to Charles Boston, plant manager, who provided an employment application for Jensen which he completed and submitted to Boston around mid-July. In it Jensen noted that he had been employed by a West Orange concern for the past 7 years, that he was then head of shipping and receiving and earning $4 per hour[2] and asked for $180 per week (or $4.50 per

[1] All dates hereinafter refer to the year 1981, unless otherwise noted.

[2] Jensen's initial recollection that he had noted $4.50 per hour as his present salary, on the employment application, was stated in error. In ac-

Continued

hour). In an interview at the same time Jensen advised Boston that his present employer was going out of business and that he was then available. During the conversation, in a discussion of salary, according to Jensen, Boston noted his 7 years' experience and stated he would try to get Jensen $5 per hour. According to Boston, after noting Jensen's 7 years' experience, he suggested $4.50 as a starting salary to which Jensen responded he would like $5 an hour but would take $4. Boston testified he replied that "if you are good and once I speak to Mr. Buchalter [Martin Buchalter, president and sole stockholder of Respondent], it's no reason why you cannot come up to $5.00 an hour." Because of Jensen's unsound recollection and the greater disparity between Jensen's present salary and the desired $5 then Jensen initially acknowledged, I credit Boston's account of this aspect of the conversation.

With respect to a decision to hire Jensen, according to Jensen at this interview he was told he would be starting in 2 weeks at the beginning of August. According to Boston, Jensen was not hired at the interview, but after an elapse of about 10 days, on Thursday, July 30, Boston told Jensen's friend to inform Jensen to report for work the following day, which was the beginning of a workweek. I conclude that while Boston probably left Jensen with the impression that he was going to be hired, and would probably be starting shortly, no specific date was set.[3] In any event, on the basis of this interview, Jensen provided 2 weeks' notice to his present employer of his intention to leave.

During this period between the interview and Jensen's starting work on July 31, Jensen and Boston had occasion to meet casually on the street while both were on their way to work. According to Jensen, the first time, a few days after their initial meeting, Boston told Jensen, "I am working on it." The second time Boston told him, "o.k., you've got it." Jensen took this last comment to mean that his request for a $5 starting salary had been approved. According to Boston, he saw Jensen and his friend every morning walking and waved to them while he drove to work. Once, at such a time, Jensen called out to him, "When am I going to get the job?" to which Boston replied, "You got it." Boston here was referring to the job and not to the requested starting rate. Whether or not Jensen made the initial inquiry, I find he misinterpreted Boston's comment which was admittedly ambiguous at best.

In fact, after informing Buchalter about someone inquiring about a job and obtaining authorization to hire someone if he needed help, Boston hired Jensen without obtaining further approval. Further, at the time of his starting work, Boston had not yet consulted Buchalter about Jensen's request for $5. This was wholly consistent with Boston's response to Jensen when the matter was first raised, that Jensen would first have to demonstrate his capabilities[4] to warrant that sum.

Within a few days of Jensen's starting work, the subject of salary arose again, at which time Jensen learned he was receiving $4.50 an hour rather than $5. Jensen testified Boston came to him and said, "Ken, Marty [Buchalter] does not want to pay the $5." Boston's recollection is that Jensen opened the matter by seeking confirmation of the $5 rate to which Boston responded, "I did not promise you $5, you have to speak to Mr. Buchalter to get his o.k. to give you $5.00." I credit Boston on this exchange. Jensen appeared genuinely disappointed and stated that he had assumed Boston's comments from his car had confirmed his receiving the increased salary. The discussion led to a reference to Respondent's probationary period and ended with Boston agreeing to speak with Buchalter to see what he would do for Jensen on the matter.

Thereafter, Jensen raised the question of the increase to $5 with Boston at every opportunity and, according to Jensen, Boston explained that he was working on it. Boston testified he spoke with Buchalter about the problem, who told him "let him work and if he is good, we will shorten the probationary period to 6 weeks." Boston reported to Jensen that he had spoken to Buchalter and the answer was: "If you are qualified, after a certain length of time, we will give you the $5."

During these few weeks after Jensen learned he would not be receiving $5 he brought his problem to the attention of at least one fellow worker, Willy Cooper, and Cooper reported to Boston that Jensen had asked him how much he made, that he had been promised X amount of money but after he came to work he was not being paid the promised amount. Buchalter credibly denied ever learning from Boston about Jensen's complaining to other employees. After a few weeks, and Boston's report of his conversation with Buchalter, Jensen informed Boston that he was going to deal directly with Buchalter. Boston did not object.[5]

On August 25, Jensen approached Buchalter's executive assistant to arrange a meeting with Buchalter. At or about 3 p.m. Buchalter saw Jensen on the plant floor and said, "I heard you wanted to talk to me." When Jensen replied, "We seem to be having a problem about my wages here," Buchalter asked Jensen to tell him about it. Jensen briefly described his encounters with Boston and the impression he had that he was supposed to be paid a certain wage. Buchalter expressed his ignorance of these meetings and then called Boston over. According to Jensen, Buchalter asked Boston if he was under the impression that Ken was supposed to get $5 an hour. Boston said yes. Then Buchalter asked if Joyce O'Dwyer, his executive assistant, was under the same impression. Again, Boston said yes. At this point, Buchalter said, "If Charles said it is five, it is five."

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tuality, he was then earning $3.80, but for a reduced workweek. This error has some significance because it was on the basis of a claim of a present salary of $4.50 that, according to Jensen, a discussion ensued following which Jensen took certain expressions and physical signs made by Boston during a later chance encounter as evidencing an understanding that he was to receive a starting salary of $5 per hour.

[3] Jensen never explained how he happened to start work on a Friday, July 31. Boston's explanation appears to be reasonable and most in accord with the facts.

[4] Respondent had a practice of utilizing a 90-day probationary period for new employees.

[5] During one of their later conversations, Boston advised Jensen that Buchalter had agreed to cut the probationary period in half, thereby reducing the time to 6 weeks. This was still unsatisfactory to Jensen.

Buchalter testified to this meeting as well as his personal knowledge of Jensen's claim and discussions relating thereto which preceded it. A week following Jensen's hire, Boston came to him and said, "I hired Jensen and now he claims I promised him $5 an hour." Buchalter responded he would give Jensen $5 if he proved himself. Thereafter, Boston came to him on multiple occasions with the same complaint voiced by Jensen. Finally, after Boston told him Jensen was driving him crazy, Buchalter suggested cutting the waiting time in half to 6 weeks. To this point, and even with respect to many aspects of the meeting of August 25, Buchalter's version of his involvement does not differ materially from Boston's or even Jensen's.

On August 25, Buchalter testified he learned that a problem he thought had been resolved was continuing unabated when Joyce O'Dwyer told him Jensen wanted to see him. Later in the day, Buchalter spoke to Jensen in the back of the plant. Jensen insisted he had been promised $5 and Buchalter replied that Boston denied making any such promise, only that Jensen would receive $5 after the 3-month period. Then Buchalter suggested bringing over Boston. When Boston arrived and Buchalter asked if he had promised the $5, Boston denied having done so. Boston also testified he denied at this meeting having made such a promise. I credit Buchalter and Boston. Among other reasons for doing so, I find it would be inconsistent and illogical for Boston to have admitted conduct at this time which he uniformly denied having engaged in on all other occasions according to the testimony of both Jensen and Boston. In any event, at this time, Buchalter said, "There really is a misunderstanding here. Let's end it now. There has been enough discussion on it. You have your $5 and it will be for the whole pay period which we are into already."[6] In view of my crediting of Boston's denial of any agreement, I also credit Buchalter's version of his remarks here.

It is uncontested that in accordance with Buchalter's promise, a check covering the current pay period in the sum of $398.75, representing 79-3/4 hours at the rate of $5 per hour was prepared in advance that week by Joyce O'Dwyer along with all other paychecks in anticipation of their distribution on September 1. The checks were prepared at that time because O'Dwyer was going to be on vacation for the period including the payroll distribution.

That paycheck was never distributed to Jensen. On Thursday, August 27, 2 days later, Jensen and Boston had some words while loading a truck, as a result of which another misunderstanding resulted, leading Jensen to believe that Buchalter had reneged in his promise to immediately raise Jensen's salary. As related by Jensen, Boston came over to him and said, "Come here, Ken" and then started yelling, "I am sorry I f— hired you. You have been a pain in my ass—. Marty has been on my ass. He does not want to give you the money." Jensen responded, "What is this all about, man," and they went into it for a few minutes. At that point, Boston walked away, and as Jensen asked him, "What is it, Charles?" Boston said, "Forget it." According to Boston, as he and Jensen were loading a truck, Jensen said, "Charlie, I hope there's no hard feelings." Boston replied, "Definitely not. But Ken, I am sorry the whole thing was blown out of proportion. Just forget it." Boston then walked away, and as Jensen sought to call him back, Boston answered, "Ken, I do not want to hear nothing. Forget it," and at the same time waved his hands in the air in a shrugging gesture.

I find that the truth of this interchange probably lies somewhere in between both versions. It is probable that Boston was disturbed about the bother Jensen had caused him, and, further, that a problem involving one of his own employees had to be ultimately resolved by Respondent's president. It is also probable that Buchalter may have been less than enthusiastic in later comments he made to Boston about the outcome of the affair. It would also appear that Boston's own admitted reluctance to discuss the matter reflected some of his own and Buchalter's reservations about having finally given in to Jensen's entreaties. Accordingly, I find that while Boston did not state to Jensen that he would not receive the raise, there was evidently something about Boston's reluctance to bury the hatchet and his use of the phrase "foget it" which led Jensen to question the finality of the agreement he had apparently achieved just 2 days earlier.

In spite of Jensen's feelings, the record is clear that Buchalter intended to honor his commitment to Jensen and pay him the $5 in his next paycheck.

Following this August 27 conversation, Jensen wrote the following note which he personally left on Buchalter's desk early on the morning of Monday, August 31.

> Mr. Buchalter:
>
> It has come to my attention that despite our conversation of last Tuesday you now plan to renege on our agreement concerning my salary. I do not understand your motivation but I do know that I can no longer tolerate the situation as it now stands. If my paycheck this Thursday does not reflect the $5 per hour salary we agreed upon, I will be left with no recourse but to file charges against you with the Wage and Hourly Division of the Dept. of Labor and the National Labor Relations Board. I hope that this action will not become necessary.
>
> Ken Jensen

On Buchalter's return later that day with Boston and another employee from a local business trip, he saw Jensen's note, started reading it, and, according to Buchalter, when he came to the portion about reneging on our agreement, explained to Boston, "He does not trust us. This is ridiculous." Immediately thereafter, when Buchalter read that Jensen could not tolerate the situation, he added, "I cannot tolerate the situation," turned to Boston and said "let him go."

That afternoon, Buchalter prepared a letter to Jensen and had a termination check drawn representing Jensen's final pay from August 21 through August 31. That letter

[6] The pay period running from Friday, August 21, through Thursday, September 3.

and final pay were given to Jensen that day. The letter reads as follows:

> August 31, 1981
>
> Dear Mr. Jensen:
>
> This is in response to your undated note to me which I found on my desk this afternoon, marked "Personal and Confidential."
>
> I would like to remind you that your application for employment dated July 9, 1981 asked for a salary of $180.00 per week or $4.50 per hour for 40 hours. Your previous employer reported you had worked for 7 years and your current salary was "approx" $4.00 per hour. It was my understanding that your performance would be reviewed and evaluated at the end of the 12[7] weeks, as is customary in our company. At that time you would receive an additional 50¢ per hour if the performance report was satisfactory.
>
> At your insistence, our Plant Manager, Mr. Charles Boston, discussed your salary review and as a result we agreed to review your performance at the end of 6 weeks instead of the usual 12.[8] One week later, on August 25, 1981, you informed Mrs. O'Dwyer that you wanted to speak with me. The discussion once again was salary. After speaking to Mr. Boston in your presence, we thought it justified to increase your salary to $5.00 per hour immediately. Your salary check for the two week period from August 21 through September 3rd had already been prepared at $5.00 per hour by Mrs. O'Dwyer prior to her leaving for vacation.
>
> This letter is to inform you that we will not be subjected to intimidation, threats or accusations of reneging on any agreements. Therefore, your employment is terminated effective immediately. The enclosed termination check represents compensation from August 21 through August 31, 1981 at $5.00 per hour.
>
> Very truly yours,
>
> Parker Laboratories, Inc.
>
> Marty Buchalter, President

According to Buchalter, his reaction to Jensen's letter was one of total shock and amazement. He was disturbed that after receiving what he wanted he was calling Buchalter and his plant manager liars.[9] As explained by Buchalter, Jensen had been doing this for a month, and this time was the last straw.

Finally, according to Buchalter the use of the phraseology later in Buchalter's discharge letter relating to intimidation, threats, or accusations of reneging on any agreements had reference to Jensen's stated unwillingness to tolerate what he perceived to be Buchalter's reneging and the general tone of the letter, and the word intimidation referred, in particular, to the hard time he had been giving Boston, his plant manager, in the factory. When asked his reaction to Jensen's statement of intention to go to the Wage and Hour Division and the NLRB, Buchalter responded, "I think I blew long before I got to that point," adding that as the letter was written in red he mentioned to Boston at some point before he completed reading the letter that "I see red." Buchalter denied that he felt in any way a sense of intimidation or threat as a result of knowing that this problem with Jensen might end up before some official tribunal. Buchalter just could not understand the purpose of the letter.[10] As Buchalter stated at the conclusion of his cross-examination, "the whole thing is the fact that in one month of employment, this person constantly, almost daily, created problems to the point that I felt he is a trouble maker. I felt that he will never be satisfied, that no matter what we do for him, he is not going to be satisfied to stay there."

Analysis and Concluding Findings

Two issues are presented for decision in this case. The first is whether Respondent discharged Jensen because he engaged in protected concerted activities other than expressing his intention to file charges with the Board, in violation of Section 8(a)(1).[11]

The General Counsel urges that Jensen's discussions with other employees concerning his wage problem is protected activity and that this activity entered into Respondent's decision to discharge him.

Respondent argues that as Jensen in the discussion of his individual claim for an increased wage with one or more other employees did not contemplate that his grievance would impact to the slightest degree upon any of the other employees, his complaint did not rise to the level of protected concerted activity. Here, Respondent relies on the views expressed by the United States Court of Appeals for the Third Circuit in *NLRB v. Northern Metal Company*, 440 F.2d 881 (3d Cir. 1971), where the fact pattern, involving a reiterated individual claim for holiday pay, was similar to the instant facts.

On this threshold issue of the nature of Jensen's conduct *viz-a-viz* other employees, I conclude that Jensen's expressions of dissatisfaction to employee Cooper with the way in which Respondent had allegedly failed to live up to a commitment for a higher starting salary for him

[7] The duplicate copy of the letter received in evidence is unclear here. The figure could be read as either 16 weeks or 12 weeks.

[8] *Ibid.*

[9] In Buchalter's view, when Jensen said in the letter that Buchalter was reneging on their agreement he was accusing Buchalter of saying one thing but of doing another, therefore, of lying about his intentions. He was also aware that Jensen had been accusing Boston of lying about the matter of the $5-an-hour salary from the very beginning.

[10] At the time, Buchalter was unaware of any interchange or "words" between Boston and Jensen subsequent to his expressing the commitment to Jensen.

[11] Initially, the General Counsel disclaimed any intention of asserting that the complaint alleges an independent violation of Sec. 8(a)(1) of the Act. Then, after Jensen completed his testimony, the General Counsel had rested and Respondent had argued for dismissal of the 8(a)(1) allegation, the General Counsel now claimed that Respondent had independently violated Sec. 8(a)(1). While I have some question about the timing of the General Counsel's change in position, in view of the posture of the complaint up to its amendment at the opening of hearing, alleging only a violation of Sec. 8(a)(1) of the Act, and the fact that Respondent, in arguing for dismissal of the allegation had assumed it to be still alive, and, further, has addressed the matter in its brief, I am prepared to make findings and conclusions on the issue.

does not constitute engagement in concerted activity protected by the Act.

Section 8(a)(1) prohibits interference, *inter alia*, with the right of employees, expressed in Section 7, "to engage in other concerted activities for the purpose of . . . other mutual aid or protection." It is clear that in griping about Respondent reneging on a promise of a higher wage, Jensen's grievance did not relate to a matter of common concern to other employees. Neither was he encouraging similar expressions of dissatisfaction which could lead to joint action about mutual concerns nor was he seeking to initiate group behavior for any particular common objective related to employees' interest. Thus, under both Board[12] and court[13] precedents in this area, I conclude that the very limited record evidence of Jensen's griping about Respondent's renouncing an individual wage agreement fails to establish that he engaged in protected concerted activity in this regard. Thus, even if Jensen's "griping" had been a motivating factor in Respondent's decision to discharge him,[14] since Respondent would have placed reliance on conduct not protected by the Act, Respondent's discharge for this reason would not have violated the Act. The evidence, however, does not support the conclusion that Jensen's griping to fellow employees played any serious role in his discharge. There is even serious doubt whether Buchalter ever became aware of Jensen's relating his wage problem to others in Respondent's employ. Buchalter himself credibly denied any such knowledge. And the only contrary evidence adduced by the General Counsel bearing on this question—a paragraph in a letter dated October 13, 1981, addressed to the Board's Regional office by Respondent's counsel and containing a reference to Buchalter advising Jensen at the August 25 meeting that he was ". . . getting other employees involved in a problem that was not of their making"—was prepared well after the event, does not accord with either Jensen's, Buchalter's, or Boston's testimony about the meeting and contains a serious misstatement of fact in describing Buchalter's taking under active consideration Jensen's request for $5 whereas, in fact, all parties agree that Buchalter granted the increase at the conclusion of the meeting.

Finally, during oral argument at the conclusion of the hearing, the General Counsel argued that the motivating factor in Jensen's termination was his threat to file charges with the Board, thereby conceding that Jensen's involvement with other employees over his wage problem was not the motivating factor for his discharge.

The second issue is whether Respondent discharged Jensen because he threatened to file charges with the Board in violation of Section 8(a)(4) and (1) of the Act.

Again, a threshold issue arises as to whether Jensen's stated intention to seek Board assistance on his wage dispute comes under the protection of Section 8(a)(4) which prohibits an employer ". . . to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act." The answer is in the affirmative. The Supreme Court has approved the Board's view that Section 8(a)(4) is not to be limited to its literal terms, but is to be construed liberally "in order to effectuate the Section's remedial purpose."[15] While the Supreme Court was applying the broad reach of Section 8(a)(4) to protect employees who had given written sworn statements to the Board, that same principle has since been applied by the Board, with court affirmance, to protect employees who express an intention to file charges.[16]

Furthermore, even though Jensen's complaint related to an individual dispute which was not encompassed by the Act's statutory protections, it is clear that even complainants who mistakenly seek to invoke Board processes will nevertheless be considered within Section 8(a)(4)'s protective reach.[17]

Having resolved these preliminary matters, the basic issue remains whether Respondent discharged Jensen because he engaged in conduct protected by Section 8(a)(4).

In analyzing this issue, I will apply the mode of analysis set forth by the Board in *Wright Line*, 251 NLRB 1083 (1980), enfd. *NLRB v. Wright Line*, 622 F.2d 899 (1st Cir. 1981), cert. denied 44 U.S. 989 (1982).[18]

Under *Wright Line*, the Board first looks to whether the General Counsel has made a *prima facie* showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. Here, the General Counsel points to the language in Jensen's letter relating to his desire to file charges against Buchalter with the Board if his next paycheck did not reflect the $5 salary agreed upon, Buchalter's immediate typed response the same day in which Jensen was informed Respondent will not be subjected to intimidation, threats, or accusations of reneging on any agreement and Buchalter's immediate decision to terminate Jensen also announced in the responsive letter. The General Counsel relies, in particular, on Jensen's August handwritten note containing his threat to file charges as providing the only new event between the pattern of Jensen's entreaties for

[12] *National Wax Co.*, 251 NLRB 1064 (1980); *Tabernacle Community Hospital & Health Center*, 233 NLRB 1425 (1977).

[13] *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964); *Indiana Gear Works Corp. v. NLRB*, 371 F.2d 273, 276 (7th Cir. 1967). See *Buddies Supermarkets*, 197 NLRB 407 (1972), enf. denied 481 F.2d 714 (5th Cir. 1973).

[14] See *Wright Line*, 251 NLRB 1083 (1980), enfd. *NLRB v. Wright Line*, 622 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[15] *NLRB v. Scrivener*, 405 U.S. 117 (1972).

[16] *First National Bank & Trust Co.*, 209 NLRB 95 (1974), enfd. 505 F.2d 729 (3d Cir. 1974). See *General Nutrition Center*, 221 NLRB 850 (1975).

[17] *Clark & Hinojosa*, 247 NLRB 710 (1980). The General Counsel does not claim that Jensen's reference to the Wage and Hour Division of the Department of Labor was a motivating factor in his discharge. Even if relied upon, I would conclude that this declared intention was neither encompassed by Sec. 8(a)(4) of the Act, nor did it constitute concerted activity for the purpose of mutual aid and protection within the meaning of Sec. 7 of the Act. See *Inked Ribbon Corp.*, 241 NLRB 7, 10 (1979).

[18] *Wright Line, id.*, and most, if not all of the succeeding cases applying its analysis, have involved alleged 8(a)(3) or (1) violations turning on employer motivation. As determination of the motive for the employer's action is the central concern governing the resolution of allegations of Sec. 8(a)(4), and as the Board has said that it will apply its *Wright Line* mode of analysis in cases where a respondent asserts that it had "good cause" for taking disciplinary action against an employee, *United Parcel Service*, 252 NLRB 1015, 1016, fn. 5 (1980)—the defense taken by Respondent here—I will apply *Wright Line* in this case. It is also noted that both counsel applied *Wright Line* in their analysis of the 8(a)(4) issue in closing arguments as did Respondent in its post-hearing brief.

the money allegedly due him commencing a month earlier, and Respondent's decision to fire him.

I am in agreement with the General Counsel that these factors provided a sufficient basis, although just barely, upon which to predicate a violation of the Act.

The next focus is on the employer's defense. Has the Respondent here come forward with sufficient evidence to show that Jensen would still have been discharged even in the absence of the protected conduct.[19]

I conclude that Respondent has rebutted General Counsel's *prima facie* case and that under either the Board's analysis or the Third Circuit modification of the Board's formulation the General Counsel has failed to sustain its burden of proof on the issue.

The history of Jensen's complaints in the month of his employment shows an employee who refused to budge an inch on his claim of breach of a prehire agreement. Even when the regular probationary period was halved he refused to compromise his demand. The consequence of his conduct was that the production manager as well as Respondent's president came to view Jensen as a pain in the neck. In spite of the negative feelings he engendered, the record is clear that Jensen finally achieved his long-sought objective of an upward revision in his rate to $5 an hour. Following on the heels of this achievement of Jensen's goal, it was exceedingly reasonable for Buchalter to conclude, as I find he did, that Jensen's heavyhanded letter was the last straw in a series of confrontations in which the employee had impugned the good faith of his employer. I conclude based both on Buchalter's description of his immediate response to Jensen's letter made in the presence of Boston, as well as his testimony explaining and clarifying the somewhat ambiguous language of his letter, and, on consideration of the history of the dispute which had simmered for some time until its seeming resolution that Buchalter became completely disenchanted with Jensen's pattern of confrontation, including his impugning of Buchalter's and his production manager's good faith, and motivated primarily, if not solely, by these considerations, took the action complained of in this case.[20]

In the absence of any independent evidence demonstrating a primary motive of punishing Jensen as an employee for seeking Board aid on his claim and given the General Counsel's failure to discredit Buchalter's testimony describing his reasonable reaction to Jensen's accusatory letter under all the surrounding circumstances of the previous interactions between Jensen and Respondent's management on this dispute including management's final accession to Jensen's "demand," and Buchalter's adequate explanation for the choice of language in the last paragraph of his written response to Jensen's note, the General Counsel's case must fail. Respondent has demonstrated a valid business reason for Jensen's discharge, one which I conclude motivated its decision to discharge Jensen even in the absence of Jensen's stated intention of filing a charge with the Board.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of the Act.

2. The General Counsel has not established by a preponderance of the evidence that the Respondent has violated the Act in any manner as alleged in the amended complaint.

Upon the foregoing findings of fact, conclusions of law, and pursuant to Sec. 10(c) of the Act, I hereby issue the following recommended:

ORDER[21]

The amended complaint is dismissed.

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[19] The Board characterizes its test as shifting the burden to the employer once the General Counsel makes a *prima facie* showing. Both the First and Third circuits have rejected any shift in the burden of proof to the employer which ultimately continues to remain with the General Counsel, while the burden of coming forward with evidence of a legitimate business reason for its action shifts to the employer. *NLRB v. Wright Line*, 662 F.2d 899 (1st Cir. 1981), and *Behring International v. NLRB*, 714 F.2d 291 (3d Cir. 1983).

[20] Given the fact that Jensen's increased compensation pursuant to agreement was reflected in a check already prepared when Jensen wrote and left his letter on Buchalter's desk, there seems to have been little reason for Buchalter to fear that Jensen would carry out his intention of filing a Board charge once Respondent's compliance with the August 25 understanding became known to him. In fact, Buchalter's letter makes clear that compliance.

[21] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.